

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT WILLIAM-AUSTIN ISHAM,

Defendant-Appellant.

UNPUBLISHED

June 14, 2007

No. 267579

Tuscola Circuit Court

LC No. 04-009190-FC

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and seven counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). The trial court sentenced him to concurrent terms of 14 to 35 years' imprisonment for his CSC I convictions and 29 months' to 15 years' imprisonment for his CSC II convictions. We affirm.

Defendant sexually abused the two minor victims when he lived in their household and acted as their babysitter. One of the victims stated that in 1997, when she was six or seven years old, defendant raped her five times in his bedroom by putting his penis in her vagina.

On cross-examination, the victim was unable to answer specific questions regarding each of the five rapes, including when the first and last rapes occurred. The prosecution argued that the victim was unable to remember the details of each rape because defendant raped her more than the five counts alleged. Consequently, the prosecution asked the court during a sidebar to allow it to introduce prior acts evidence in accordance with the holding in *People v DerMartex*, 390 Mich 410, 413; 213 NW2d 97 (1973).

The trial court ruled that the other-acts evidence could be introduced to "aide the jurors in assessing the credibility of the witness as to the testimony concerning the counts enumerated in the information." The victim then testified before the jury that the sexual abuse occurred about once or twice a week.

Defendant argues on appeal that the trial court erred when, pursuant to MRE 404(b), it admitted evidence into trial that defendant had sexually abused the victim more times than he had been charged.¹

This Court reviews a trial court's decision regarding the admission of other-acts for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). However, when decisions regarding the admission of evidence involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence, we review those questions of law de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Under de novo review, this Court gives no deference to the trial court. *People v Howard*, 233 Mich App 52, 54; 595 NW2d 497 (1998).

Generally, the Michigan Rules of Evidence prohibit the use of character evidence to prove action in conformity therewith. MRE 404; *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Character evidence includes evidence of other crimes, acts, or wrongs, such as, in this case, the victim's testimony that defendant sexually abused her several times a week over a period of time and not solely during the instances for which the defendant was charged. See *Starr, supra*, 494-495. However, MRE 404(b)(1) is a rule of inclusion that permits the admission of evidence on any ground, not solely those enumerated, which does not risk impermissible inferences of character to conduct. *Starr, supra*, 496.

"To protect against such impermissible inferences, [the Michigan Supreme] Court has established a procedural safeguard in the form of a four-pronged standard that a trial court must insure is satisfied before admission of other acts evidence." *Id.* Evidence of bad acts is only admissible under MRE 404(b) if (1) the evidence is offered for a proper purpose under 404(b) and not to prove the defendant's character or propensity to commit the offense, (2) the evidence is relevant under MRE 402 as enforced through MRE 104(b), and (3) the probative value of the evidence is not substantially outweighed by its potential of unfair prejudice to the defendant under MRE 403. *Starr, supra*, 496; see also *People v Vandervliet*, 444 Mich 52, 74-75; 508

¹ MRE 404 provides, in relevant part:

(b) Other crimes, wrongs, or acts.

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

NW2d 114 (1993). Moreover, the trial court may, upon request, provide a limiting instruction to the jury. *Starr, supra*, 496.

Establishing that a victim is credible in a sexual offense case is a proper purpose for admitting other-acts evidence under MCL 768.27 if the other acts tend to show similar sexual familiarity between the defendant and the victim.² *DerMartzex, supra*, 413.

At trial, the victim's credibility was at issue because she was unable to answer the defense's specific questions about the charged sexual offenses. Defendant, by his general denial of the charges, implied that the victim was fabricating the charges. Therefore, the prosecution offered the evidence of other acts to aid the jury in its assessment of the victim's credibility. The trial court allowed the other-acts evidence solely for that purpose.

To establish relevance, the prosecution must demonstrate through reasonable inferences a relationship between the evidence and a material fact at issue that makes the material fact more probable or less probable than it would be without the evidence. *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998); MRE 401. When the only relevance of the proposed evidence is to show the defendant's character or propensity to commit the crime, the evidence must be excluded. *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004).

The victim was unable to answer defense counsel's specific questions regarding the charged sexual offenses, and, therefore, the victim's credibility became a material fact at issue. The other-acts evidence of the victim's frequent sexual encounters with defendant tended to make the victim's credibility more probable because the other acts explained her inability to testify in detail regarding the charged offenses.

In determining the probative value, this Court applies the balancing requirement of MRE 403. See *VanderVliet, supra*, 71-72. Whether MRE 403's balancing test favors the admission of evidence is a determination best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002).

"[I]t has been held that the probative value outweighs the disadvantage where the crime charged is a sexual offense and the other acts tend to show similar familiarity between the defendant and the person with whom he allegedly committed the charged offense." *DerMartzex, supra*, 413. Such evidence provides a point of reference for the witness's testimony, which, standing alone, may appear unnatural or improbable. *Id.*, 414.

Following *DerMartzex*, the trial court in this case recognized that before it was a sexual offense case in which defendant and the victim had previous sexual encounters, that the multiplicity of the sexual encounters made the victim's vague answers seem less incredible, that many years had passed since the offenses occurred, and that the victim was a young child when the charged offenses occurred. The danger of unfair prejudice to defendant did not substantially

² MRE 404 was adopted after the ruling in *DerMartzex* was issued. However, MCL 768.27 contains language comparable to MRE 404(b).

outweigh the probative value of the evidence, which was offered solely to assess the victim's credibility.

Finally, the trial court gave an appropriate limiting instruction to the jury when it directed that the other-acts evidence be considered only for the limited purpose of judging the credibility of the witnesses.

The other-acts evidence was admitted for a proper purpose – that of assessing the victim's credibility. The probative value of the prior uncharged offenses was directly relevant to the victim's credibility and the jury received an appropriate limiting instruction. Accordingly, the other-acts evidence satisfied all prongs of the four-part *VanderVliet* test and, therefore, the trial court did not abuse its discretion in admitting the evidence at trial.³

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

³ In his appellate brief, defendant focuses on the testimony of one of the victims, but we note that our analysis also applies to the testimony of the other victim.